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Supreme Court of the United States

October Term, 1957

No. 12

STATE OF MINNESOTA,

Respondent,

vs.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

BRIEF IN OPPOSITION TO RESPONDENT'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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AUTHORITIES

Page

Cases:

Memphis Natural Gas Co. v. Beeler,
315 U.S. 649, 62 S. Ct. 857 (1942) 5, 6, 7

Shaffer v. Carter,
252 U.S. 37, 40 S. Ct. 221 (1920) 5, 6

Spector Motor Service v. O'Connor,
340 U.S. 602, 71 S. Ct. 508 (1951) 6, 7

Stockham Valves & Fittings, Inc. v. Williams,
S. Ct. Georgia, decided November 8, 1957 ..... 2, 7

U. S. Glue Co. v. Town of Oak Creek,
247 U.S. 321, 38 S. Ct. 499 (1918) 5, 6, 7

West Publishing Company v. McColgan,
328 U.S. 823, 66 S. Ct. 1378 (1946) 5, 6

Miscellaneous:

Harvard Business Review, Vol. 35, No. 4 2

Ohio State Law Journal, Vol. 18, No. 1 ..... 4, 5

Vanderbilt Law Review, Vol. 4 6

30 Taxes 263 7

Supreme Court of the United States

October Term, 1957

No. 606

STATE OF MINNESOTA,

Respondent,

vs.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

BRIEF IN OPPOSITION TO RESPONDENT'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The State of Minnesota, in its "Statement Opposing Jurisdiction and Motion to Dismiss or Affirm" suggests that this Court dispose of this proceeding, on the theory that both the commerce clause and the due process clause questions have been foreclosed by prior decisions of this Court.

The problem is not quite that simple. For example, since the appellant filed its Jurisdictional Statement, the Supreme Court for the State of Georgia[1] (*Stockham Valves & Fittings, Inc. v. Williams* decided November 8, 1957) has held that the attempt of that state to impose an income tax upon a foreign corporation doing an exclusively interstate business in that state, under circumstances practically identical to the facts in this case, was invalid as violating both the commerce and the due process clauses of the Federal Constitution.

The view of the Georgia Supreme Court certainly is wholly contrary to that expressed by the Attorney General of the State of Minnesota in his statement in this proceeding. The Supreme Court of Minnesota itself has now certified to this Court that the decision it rendered in this case is substantial and important. The original of that certification has been filed with this Court and is reproduced in full in the appendix attached hereto.

In an article published in the July-August 1957 issue of the *Harvard Business Review* entitled "Legal Hazards of Interstate Business",[2] the practical aspects of this problem were very comprehensively discussed. The views expressed therein are diametrically opposed to those of the State of Minnesota here, for the authors say:

> "It is no wonder, therefore, that many pitfalls and hazards await the growing corporation in almost every state where it goes to do business. To illustrate:

[1]The opinion of the Supreme Court of the State of Georgia is as yet unreported except in looseleaf services. However, it is reproduced in the appendix attached hereto. A motion for rehearing in the case was filed by the State of Georgia and this was denied by that Supreme Court on November 26, 1957. The Revenue Commissioner of the State of Georgia has announced that a petition for a writ of certiorari will be filed in this Court.

[2]*Harvard Business Review*, Vol. 35, No. 4, p. 81, Article by Roger D. Swett and John W. Hupp.

"In 1955 an Iowa cement company which had for years been shipping cement to customers in Minnesota was held liable in the Minnesota courts for unpaid state income taxes, interest, and penalties in excess of $100,000 covering a period of 15 years. During those 15 years the company had maintained a small sales office in Minneapolis and had shipped cement from its Iowa plant to Minnesota customers on orders accepted in Iowa, but it had never qualified to do business in Minnesota. The court held that it had nevertheless been doing sufficient business in Minnesota to be subject to the state income tax law." [The article cited this very case.]

And further, in the same article under a section entitled "Confusing Tax Laws" they stated:

"The biggest problem for corporate management is state taxation. Coping with these highly technical and varying laws is difficult, and has been compounded by a long line of confusing court decisions on the extent to which the federal Constitution permits a state to exact taxes from foreign corporations (i.e., companies incorporated in other states). As a result, each of the various types of state taxes involves many perplexing problems.

* * *

"The tax problem is serious not only because the taxes themselves are burdensome, but also because failure to comply with the tax laws may have unfortunate results. Determinations of liability are made by the state authorities or the state courts, and doubts are usually resolved *against* foreign corporations. For the growing corporation a day of reckoning with state and local tax authorities is almost a certainty. This is especially so since under most state tax laws the statute of limitations does not run in favor of the taxpayer unless returns have been filed.

"In failing to comply with applicable state tax laws, a corporation may be exposing itself, its officers, and its local agents to criminal prosecution. In addition there is the danger of liability for back taxes, which can be especially heavy because of interest rates and penalties. In the case of the Iowa cement company referred to at the outset of this article, about one-third of the $100,000 judgment represented interest and penalties. Often the state tax authorities use the threat of interest and penalties as a lever to obtain advantageous settlements. The foreign corporation which has developed a substantial business in a state usually has too much at stake to be in much of a position to bargain."

The Law School of the Ohio State University recently took occasion to devote an entire issue of the *Ohio State Law Journal to* the question of state taxation of multistate business. In an article entitled "State Taxation of Interstate Commerce: From Form to Substance and Back Again"[3] a very learned thesis on this subject was presented in which the following comments were made:

"The problems presented by state taxation in the area of interstate commerce have been numerous and possess remarkable longevity. From Marshall's discussion in Brown v. Maryland in 1827 to the year 1954, when the Supreme Court considered the matter at length in several cases, the probing for lasting solutions to the frequent conflict between the commerce clause and the power of the state or one of its political subdivisions to tax has continued. Nor does the absence of written opinion by the Supreme Court in the last three years indicate that principles have finally, or even temporarily, crystalized for the guidance of state legislatures, state

[3]Ohio State Law Journal, Vol. 18, No. 1, page 9, by Albert R. Menard, Jr., Professor of Law, University of Colorado.

departments of revenue and taxpayers, and that disagreement is at an end. An inspection of the docket for the current term of the Supreme Court as of the time when the final draft of this article is in preparation (December, 1956) reveals the filing of no less than seven cases involving this issue. True, certiorari has been denied or the appeal dismissed in nearly all, and perhaps the remainder will produce no major decision. However, the current confusion surrounding the commerce clause issue no doubt was one of the factors that impelled attorneys to carry the cases up, and Justice Frankfurter has reminded us on a number of occasions that a failure of the Supreme Court to accept and review a case on the merits should not be deemed a concurrence in the correctness of the decision of the state court."

In another article in the same issue of the *Ohio State Law Journal* entitled: "State Fiscal Needs and Interstate Commerce"[4] the author, in discussing the question of taxation of interstate business, concluded:

"Perhaps the most disturbing aspect of the whole matter is the continuing uncertainty concerning the validity of the application of state tax laws to interstate activities."

In support of its motion to dismiss or affirm on grounds that the issues implied herein have been foreclosed by prior decisions of this Court, respondent relies upon the cases of *U. S. Glue Co. v. Town of Oak Creek*, 247 U. S. 321, 38 S. Ct. 499 (1918); *Shaffer v. Carter*, 252 U. S. 37, 40 S. Ct. 221 (1920); *Memphis Natural Gas Co. v. Beeler*, 315 U. S. 649, 62 S. Ct. 857 (1942); and *West Publishing Co. v. McColgan*, 328 U. S. 823, 66 S. Ct. 1378 (1946).

[4] Ohio State Law Journal, Vol. 18, No. 1 pp. 43-51 by Diswell L. Pierce, Secretary of the Board of Equalization, Sacramento, California.

Not one of these said cases deals with or in any way decided the critical issues involved in the instant case. In the *Oak Creek* case, the taxpayer was a *domestic* corporation unqualifiedly doing *intrastate* as well as interstate business, and the Wisconsin state income tax was applied to both intrastate and interstate income of the corporation. In *Shaffer v. Carter*, supra, the State of Oklahoma imposed its net income tax upon the income of a non-resident individual earned from business he conducted in that state which was primarily intrastate in nature.

With respect to the *West Publishing Co.* case, this Court affirmed in a per curiam opinion the decision of the California Supreme Court upholding the application of a California net income tax as applied to West Publishing Co. However, the following perceptive observation with regard to the significance and controlling effect of this case, was made by Professor Edward L. Barrett, Jr., Professor of Law at the University of California;[5]

> "In affirming the California decision the Court merely cited four prior cases, *none of which presented directly the problem of a net income tax on a corporation doing a wholly interstate business.*" (Emphasis supplied.)

In the case of *Memphis Natural Gas Co. v. Beeler*, supra, this Court upheld a tax on net income on the ground that the taxpayer was doing an *intrastate* business. It also stated, but purely by way of dictum, that the tax would be valid even if the business were wholly interstate. This specific language set forth as dictum in the *Beeler case* was expressly rejected by this Court in its subsequent decision in *Spector Motor Service, Inc. v. O'Conner*, 340 U. S. 602, 71 S. Ct. 508 (1951).

[5] *4 Vanderbilt Law Review* 520 (1951).

In an analysis of the effect and importance of *Oak Creek*, *Beeler*, and *West Publishing Co.*, with respect to the validity of a net income tax as applied to exclusively interstate commerce, Reuben Clark, Jr., in an article entitled "Interstate Commerce and a State's Right to Revenue: A Rejoinder," 30 Taxes 263, at p. 266, based upon his observation of this Court's decision in *Spector Motor Service, Inc.*, supra, states:

> ". . . Regally it ignored *West*, leaving interpretation of that baffling case for some later opportunity. *Oak Creek* and its kindred cases were referred to as evidencing no more than the principle that where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate—scarce recognition of the principle that the apportioned net income tax is valid per se, as applied to interstate commerce! The familiar language of *Beeler* was disowned as mere dicta; 'any suggestion in that opinion as to the possible validity of such a tax if applying to earnings wholly derived from interstate commerce is not essential to the case.' If the Court did not here have in mind the inherent similarity of all apportioned net income taxes—'privilege' and 'nonprivilege'—this footnote seems to be a most gratuitous aside." . . .

It is earnestly submitted that a review of this problem by this Court is imperative. Should this appeal be dismissed, as the State suggests, and certiorari be denied in the *Stockham Valves & Fittings*, Inc. case, arising out of the State of Georgia, foreign corporations carrying on an interstate business in Minnesota will find themselves subjected to a com-

pletely discriminatory tax levy solely because Minnesota happens to be one of the jurisdictions in which their interstate commerce is carried on. Such a situation would be untenable.

Respectfully submitted,

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Supreme Court of Georgia

Decided November 8, 1957

No. 19838

STOCKHAM VALVES & FITTINGS, INC.

v.

WILLIAMS, State Revenue Commissioner.

By the Court:

The Georgia Income Tax Statute (Code, Ann. Supp., § 92-3113) as applied to the plaintiff, a non-resident corporation with its home office and manufacturing plant outside of the State of Georgia, which maintained only a sales service office in this State which was used as headquarters by one of its sales representatives who spent about one-third of his time in that office or traveling within the State of Georgia, and in which office a small amount of office furniture, valued at approximately $1,000, was maintained, and one woman secretary was employed, and where the sales representative carried on the ordinary duties of a salesman in Georgia calling on customers and prospective customers, but no orders were accepted within the State of Georgia, and all sales were made on an "f.o.b. warehouse" basis and were completed at warehouses outside of the State of Georgia by deliveries to customers or to common carriers consigned to customers, violates both the commerce and due process clauses of the Federal Constitution, Code §§ 1-125(3) and 1-815, and the trial court erred in sustaining its validity as against such attacks.

This was an action brought by Stockham Valves & F tings, Inc., hereinafter referred to as plaintiff, against T. Williams, as Revenue Commissioner of the State of Georgi to recover income taxes paid by the plaintiff under prote to the State of Georgia for the calendar years 1952, 195 and 1955, assessed against the plaintiff under the followi Georgia Income Tax statutes: Code, Ann. Supp. §92-310 which provides "Every domestic corporation and every fo eign corporation shall pay annually an income tax equivale to four per cent of the net income from property owned from business done in Georgia, as defined in section 92-3113 and Code, Ann. Supp. §92-3113, which provides "The tax i posed by this law shall apply to the entire net income, as he in defined, received by every corporation, foreign or domesti owning property or doing business in this State. Every su corporation shall be deemed to be doing business within th State if it engages within this State in any activities or tra actions for the purpose of financial profit or gain, wheth or not such corporation qualifies to do business in this Stat and whether or not it maintains an office or place of doi business within this State, and whether or not any su activity or transaction is connected with interstate or forei commerce." Claims for refund of the taxes paid having be denied by the defendant the present suit was brought.

The plaintiff contends that all of its activities within t State of Georgia are a part of and inseparable from inte state commerce, and that any income tax assessed against t plaintiff is a direct burden on such commerce and violat the commerce clause of the Federal Constitution, Co §1-125(3); that the fact that the plaintiff maintains one sal service office in Georgia and one of its sales representativ

spends one-third of his time in Georgia does not make plaintiff present in the State in any substantial sense, and an attempt to subject it to an income tax violates the due process clause of the Federal Constitution, Code §1-815. No question is raised by the plaintiff as to the reasonableness of the apportionment of its net income to Georgia under the prescribed statutory apportionment formula or to the amount of taxes, if liable, but the plaintiff contends that the State of Georgia is without jurisdiction to impose a net income tax upon a foreign corporation engaged within Georgia in exclusively interstate commerce.

The facts were stipulated, and the issue submitted to the trial judge without a jury, and to the judgment upholding the validity of the statute and the tax the plaintiff excepts.

From the stipulation of facts it appears that plaintiff is a corporation organized under the laws of Delaware with its principal or home office and its manufacturing plant located in Birmingham, Alabama. Plaintiff, since 1905, and including the tax years in question, has been engaged in the business of manufacturing and selling valves and pipe fittings and in promoting the sale and use of valves and pipe fittings which it manufactured. For the tax years in question, it maintained inventories of its products in established warehouses at Birmingham, Ala., Philadelphia, Pa., Chicago, Ill., Houston, Tex., and Vernon, Calif. It maintained established sales service offices at the foregoing locations and also at Cambridge, Mass., New York, N. Y., Atlanta, Ga., Pittsburgh, Pa., San Francisco, Calif., Washington, D. C., Dallas, Tex., and St. Louis, Mo. Purchasers of plaintiff's valves and pipe fittings were located in all the United States.

As a matter of policy and practice, during the tax years in question, plaintiff made sales only to established local wholesalers and jobbers and (except for sales to makers of automatic sprinkler system) made no sales directly to users and installers of valves and pipe fittings. The local wholesalers and jobbers who handled plaintiff's products, however, were in no way tied in or committed by any type of license, franchise, or other authorized or exclusive dealership arrangement, to the distribution of plaintiff's products. Any established local wholesaler or jobber, having established credit was considered as a prospective customer and could buy from plaintiff. Established local wholesalers and jobbers who did buy from plaintiff were entirely free to discontinue buying from plaintiff at any time and for any reason; they were also free to deal in competitive products and usually did handle one or more lines of competing products.

Plaintiff, during the years in question, made no sales on consignment basis and maintained no inventories of its own at any place except at the aforesaid warehouses, none of which were located in Georgia. Through its sales representative, it encouraged every local wholesaler and jobber who handled its products to carry a local inventory, and to those local wholesalers and jobbers who did maintain a local inventory of valves, it gave a price concession which was not available to wholesalers and jobbers who did not. Pipe fittings were, however, sold at uniform prices whether or not carried in inventory.

All orders for plaintiff's products were contractually accepted or rejected at the home office of plaintiff in Birmingham, Alabama. No representative of the Company at any sales service office had any authority to, or did, contractually

accept or reject any order under any circumstances. Contractual authority was vested exclusively in the home office in Birmingham, Alabama. For the most part, orders were received by mail at the Company's home office in Birmingham directly from wholesalers and jobbers. Such orders as were received at sales service offices, or by the solicitation of sales representatives working out of sales service offices, were relayed by mail, telephone or teletype to the home office at Birmingham for contractual acceptance or rejection. Some such orders were rejected by the home office for credit or other reasons.

Plaintiff had no plant or warehouse located in Georgia. All sales were made on an "f.o.b. warehouse" basis and were completed at the plant or warehouse by deliveries to customers or to common carriers consigned to customers.

Since 1950, and during the tax years in question, plaintiff maintained a sales service office in Atlanta. One of its sales representatives used this office as his headquarters. He worked in a territory which included Georgia, North Carolina, South Carolina and parts of Tennessee and Virginia. Part of Florida was also included in his territory until 1954. This representative spent approximately one-third of his time at the Atlanta sales office or traveling in the State of Georgia. The other two-thirds of his time was spent traveling outside of Georgia. He was paid a salary plus a commission on the amount of business derived from the territory served by the Atlanta office.

Plaintiff also employed at its sales service office in Atlanta a full-time woman secretary. She functioned on the basis of her own knowledge and experience and literature furnished by the Company as a source of information concerning plain-

tiff's products. She performed stenographic and clerical duties and facilitated communications between plaintiff's home office in Birmingham, plaintiff's sales representative when he was out in the territory, and customers, prospective customers, contractors and users of plaintiff's products. She operated the teletype machine and sometimes obtained information from Birmingham to give to architects, engineers or other people interested in plaintiff's products.

The Atlanta sales service office was listed in the Atlanta telephone directories in plaintiff's name in both the alphabetical and classified business listings. The office was listed in plaintiff's name in the Atlanta city directories. The Company, on its sales service office letterheads, in its catalogues and discount sheets, and on some promotional material, listed the fact that it maintained a sales service office in Atlanta. A small amount of office furniture was maintained there of the approximate value of $1,000. The representative carried on the ordinary duties of a salesman in Georgia. No orders were, however, accepted within the State of Georgia. All sales were completed at warehouses outside the State of Georgia by deliveries to customers or to common carriers consigned to customers. All such sales took place outside of Georgia.

At no time during the tax years in question did plaintiff qualify to do business within the State of Georgia; no officers or director of plaintiff was a resident of Georgia; the Atlanta sales representative was a resident of Georgia. During the tax years in question, rent, salaries and all other expenses of the Atlanta office were paid by check drawn by officers located at the home office on bank accounts of the company in banks outside the State of Georgia. No employee of plaintiff

in Georgia had authority, either alone or with any other person to draw checks upon or make withdrawals from any bank account of the company. Expense accounts of employees at the Atlanta office were forwarded to the home office where they were reviewed and paid by checks. Plaintiff kept no bank account in the State of Georgia. All credit matters were handled at plaintiff's Alabama office where credit information was obtained and all credit questions passed on. All invoices were prepared and mailed from and all collections were made by plaintiff's office in Alabama. No employee of plaintiff in Georgia had authority nor did any employee accept any order, bind plaintiff to furnish goods, arrange credit terms, or make collections.

Hawkins, Justice: (After stating the foregoing facts.) That the decision of the questions here presented is not without difficulty is pointed out by the Supreme Court of the United States in the recent decision in Freeman v. Hewit, 329 U. S. 249, 252, (67 Sup. Ct. 274, 91 L. Ed. 265), where it is said: "The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts."

In LeLoup v. Port of Mobile, 127 U.S. 640, 648 (8 Sup. Ct. 1380, 32 L. Ed. 311), the Supreme Court stated the fundamental limitations of the commerce clause on state taxation as follows: "In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by

way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." In Forrester v. Culpepper, 194 Ga. 744, 748. (22 S.E. 2d 595), this court quoted with approval from Interstate Bond Co. v. State Revenue Commissioner, 50 Ga. App. 744, 751 (179 S.E. 559), the following: "The general view is that an income tax is not a property tax, but more in the nature of an excise tax." In Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 218 (45 Sup. Ct. 477, 69 L. Ed. 916, 44 A.L.R. 1219), a Massachusetts excise tax based on the proportion of a company's assets employed in the state and the proportion of its net income derived in the state was held unconstitutional as applied to a taxpayer engaged exclusively in interstate commerce. Taxpayer maintained a branch sales office in Massachusetts which was used as headquarters by its traveling salesmen. It owned office equipment there and its local manager handled petty cash items for the company through a bank account maintained in his own name. The court found that all of taxpayer's activities were an integral part of interstate commerce and therefore held the excise unconstitutional. The court said: "The local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed. Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, approved such an excise measured by income reasonably attributed to intra state business; but nothing there said was intended to modify well established principles. It must be read with the

essential facts in mind. Local business was a sufficient basis for the excise, and there was no taxation of interstate commerce or property beyond the state." In Spector Motor Service v. O'Connor, 340 U.S. 602, 609 (71 Sup. Ct. 508, 95 L. Ed. 573), it is said: "This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state."

From the foregoing statement of facts it appears without dispute that the plaintiff was engaged exclusively in interstate commerce insofar as its activities in Georgia are concerned, and in Atlantic Lumber Co. v. Commissioner of Corporations and Taxation of Massachusetts, 298 U.S. 553, 555 (56 Sup. Ct. 887, 80 L. Ed. 1328), it was held: "If appellant did nothing but transact interstate business, the tax would constitute a burden upon that commerce, and could not stand under the commerce clause of the Constitution."

Counsel for the defendant contend that a tax on net income does not stand upon the same basis and is not the equivalent of a license, occupation, franchise, or privilege tax on interstate commerce, but, as previously pointed out, we have held that an income tax is in the nature of an excise tax, and in the footnote added to the dissenting opinion written by Mr. Justice Reed in Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 677 (69 Sup. Ct. 1264, 93 L. Ed. 1613), it is said: "Since we perceive no difference for the purposes of this case between franchise, privilege, and excise taxes, insofar as they are exacted for the privilege of doing or the

doing of interstate business, we have treated them as identical as far as their validity under the commerce clause is concerned. In Ozark and Anglo-Chilean Nitrate the taxes were called franchise taxes; in Alpha it was labeled an excise tax." In Dennison Manufacturing Co. v. Wright, 156 Ga. 789 (3-b) 120 S.E. 120), this court held: "Where a foreign corporation rents and maintains an office in this state, with a stock of samples and a force of office employees and traveling salesmen, merely to obtain orders in this State and other States, subject to approval by its home office, for its goods to be shipped directly to its customers from its home State, such an arrangement is part of its interstate commerce, and not subject to a local excise tax."

We are also of the opinion that the income tax statute here under consideration as applied to the plaintiff, violates the due process clause of the Federal Constitution. We take it that no one will question the fact that a State may not tax activities carried on outside its borders without violating this provision of the Constitution. The question in every such case is whether such a connection exists between a business and the taxing State as to permit the imposition of a general income tax on a portion of the net income of the business, and in Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 (61 Sup. Ct. 246, 85 L. Ed. 267), the Supreme Court said: "That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." See also Miller Brothers Co. v. Maryland, 347 U.S. 340, 344 (74 Sup. Ct.

535), 98 L. Ed. 744), where the foregoing rule was applied to facts quite similar to those in the instant case. There the court said: "The question here is whether this vendor, by its acts or course of dealing, has subjected itself to the taxing power of Maryland or whether it has afforded that State a jurisdiction or power to create this collector's liability." After referring to its previous decisions, that court said: "Our decisions are not always clear as to the grounds on which a tax is supported, especially where more than one exists; nor are all of our pronouncements during the experimental period of this type of taxation consistent or reconcilable. A few have been specifically overruled, while others no longer fully represent the present state of the law. But the course of decisions does reflect at least consistent adherence to one time honored concept; that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."

This court, in Redwine v. Dan River Mills, Inc., 207 Ga. 381 (61 S.E. 2d 771), held that activities more extensive than those carried on by the plaintiff did not constitute "doing business" within the meaning of the income tax act then in effect, and in Suttles v. Owens-Illinois Glass Co., 206 Ga. 849 (59 S.E. 2d 392), it was held that accounts growing out of similar activities in Georgia did not have a tax situs in Georgia. See also Norton Co. v. Department of Revenue of Illinois, 340 U.S. 534 (71 Sup. Ct. 377, 95 L. Ed. 517).

We hold therefore that as applied to the plaintiff the Georgia Income Tax Act violates both the commerce and due process clauses of the Federal Constitution, and the

trial court erred in rendering judgment against the plaintiff. The cases relied upon mainly by the defendant, namely, U. S. Glue Co. v. Town of Oak Creek, 247 U.S. 321 (38 Sup. Ct. 499, 62 L. Ed. 1135); Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (41 Sup. Ct. 45, 65 L. ed. 165): Atlantic Coast Line R. Co. v. Doughton, 262 U.S. 413 (43 Sup Ct. 620, 67 L. Ed. 1051); Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (62 Sup. Ct. 857, 86 L. Ed. 1090); West Publishing Co. v. McColgan, 27 Cal. 2d 705 (166 Pac. 2d 861), and others, are clearly distinguishable on their facts. In those cases the taxpayers were either residents of the taxing State, or were carrying on within the State extensive intrastate as well as interstate business, or else the statements therein made which would seem to conflict with the rulings here made were obiter. In Freeman v. Hewit, 329 U.S. 249, 255 (67 Sup. Ct. 274, 91 L. Ed. 265), the Supreme Court of the United States recognized that the taxing power permitted by the U. S. Glue Company case, supra, was only applicable to residents of a State. It said: "It (a State) can tax the privilege of residence in the State and measure the privilege by net income, including that derived fron interstate commerce." The Underwood Typewriter decision, supra, was explained and limited in Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 218 (45 Sup. Ct. 477, 69 L. Ed. 916, 44 A.L.R. 1219), where the court said: "The local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed. Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, approved such an excise measured by income reasonably attributed to intrastate business; but nothing there said was

intended to modify well-established principles." The dictum in the Beeler case, supra, was expressly disapproved as such by the Supreme Court in Spector Motor Service v. O'Connor, 340 U.S. 602, 609 (71 Sup. Ct. 508, 95 L. Ed. 573), in the following language: "Any suggestion in that opinion as to the possible validity of such a tax if applied to earnings derived wholly from interstate commerce is not essential to the decision in the case."

As already pointed out by the United States Supreme Court, its decisions dealing with the problem here presented are spread through hundreds of volumes of its reports, and all of its pronouncements are not consistent or reconcilable. To attempt to harmonize all that has been said would neither clarify what has gone before nor guide the future, and to undertake here to point out the distinguishing features of each of the numerous decisions would only consume unnecessary time and space.

Judgment reversed. All the Justices concur except Head, J. who dissents.

IN THE SUPREME COURT OF MINNESOTA

STATE OF MINNESOTA,

Respondent,

vs. 36826

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

MOTION

Now comes the Appellant, Northwestern States Portland Cement Company, and based upon all the proceedings of record in the above entitled case, respectfully moves this Court for its Certificate setting forth that its decision in the above entitled case entered on September 10, 1957 was based upon the determination of a substantial and important federal question.

Dated this 6th day of December, 1957.

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Endorsed:
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Dec. 12, 1957
Mae Sherman

IN THE SUPREME COURT OF MINNESOTA

STATE OF MINNESOTA,

Respondent,

v.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

CERTIFICATE

On motion of the Appellant, Northwestern States Portland Cement Company, this Court, in addition to its decision and orders made herein, orders it to be certified and made part of the record in this case and of the judgment heretofore rendered herein, that in its appeal from the District Court of Hennepin County, Minnesota, and in the argument both oral and by brief, made in this Court, the Appellant raised and relied upon the assertion that the statute, Minnesota Laws 1933, Chapter 405, Section 3; re-enacted and amended in Minnesota Laws 1937, Extra Session, C. 49, Sec. 3; re-enacted and amended in Minnesota Laws 1941, C. 550, Sec. 1; and re-enacted and amended in Minnesota Laws 1945, C. 410, Sec. 1; coded as Minnesota Statutes, § 290.03, sought to be enforced by the Respondent, was repugnant to and void under the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States, and the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. It is further certified that the issues as thus presented in this case, made it incumbent upon this Court, as part of its decision, to render

its determination with respect to a substantial and important federal question, namely, whether Respondent's enforcement of Minnesota Statutes § 290.03, [Minnesota Laws 1933, Chapter 405, Section 3; re-enacted and amended in Minnesota Laws 1937, Extra Session, C. 49, Sec. 3; re-enacted and amended in Minnesota Laws 1941, C. 550, Sec. 1; and re-enacted and amended in Minnesota Laws 1945, C. 410, Sec. 1,] was in violation of the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States, and the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, and the decision of the Court in this case is based in substantial part upon that determination. This certificate is not to be construed as a modification of the aforesaid decision.

Dated this 12th day of December, 1957.

SUPREME COURT OF MINNESOTA
ROGER L. DELL
Chief Justice

SUPREME COURT
Filed Dec. 12, 1957
Mae Sherman, Clerk